LIBRARY
SUPREME COURT, U. S.

Supreme Court, U. S.
FILED
MAR 11 1972

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1024

SIXTY-SEVENTH MINNESOTA STATE SENATE,
Appellant-Intervenor,

vs.

RICHARD A. BEENS, PHILLIP KRASS, and LAWRENCE E. MEUWISSEN,
Appellees,

ARLEN ERDAHL, GEORGE B. HICKEY, CHARLES LeFEBVRE, JOSEPH W. NOTERMAN, and WILLIAM J. SCHNEIDER,
Appellees,

ROLLIN H. CRAWFORD, JAMES M. KING, and ROBERT C. VOSS,
Appellees-Intervenors.

ON APPEAL FROM THE UNITED STATES DISTRICT COUET FOR THE DISTRICT OF MINNESOTA

MOTION OF APPELLEES TO DISMISS APPEAL OR AFFIRM PURSUANT TO SUPREME COURT RULE 16

ALAN W. WEINBLATT
228 Metro Square Building
Saint Paul, Minnesota
Attorney for Appellees Beens, Krass & Meuwissen

Of Counsel:
SYDNEY BERDE
BERDE, LEONARD AND WEINBLATT

INDEX

	PAGE
Motion	2
Counter Statement of the Case	2
I. Appellant Lacks Standing and Authority to Prosecute This Appeal	6
II. This Court Does Not Have Jurisdiction of the Appeal pursuant to 28 U.S.C. §1253	9
III. The Judgment of the District Court Should Be Summarily Affirmed	14
IV. Failure of This Court to Dismiss the Appeal or Affirm the Order of November 15, 1971 Will Work Great Hardship Upon the Electoral Process of the State	20
Appendix:	
Notice of Appeal to the Supreme Court of the United States from the November 15, 1971 Order of the United States District Court for the District of Minnesota	A-1
Complaint	A-2
Order Permitting Intervention of Sixty-Seventh Minnesota State Senate and Rollin H. Crawford, James M. King and Robert C. Voss, Entered October 15, 1971	A-12
Findings and Order of United States District Court Granting Declaratory Judgment, Issuing Injunction, Appointing Special Masters and Adopting Schedule, Entered November 15, 1971	A-17

PAGE

Order of the United States District Court Adopting Criteria for Reapportionment, Permitting Amici Curiae and Inviting Further Briefs, Entered November 26, 1971 ..... A-20

Memorandum Opinion of the United Statest District Court in Support of Order of November 26, 1971 ... A-23

Order of United States District Court Adopting Final Criteria for Reapportionment Plans and Denying Certain Motions, Entered December 3, 1971 ..... A-27

Memorandum Opinion of the United States District Court in Support of Order of December 3, 1971 .... A-29

Senate Journal for July 31, 1971 Showing Adoption by Minnesota Senate of Senate Resolution 3 ..... A-34

Senate Journal for October 12, 1971 Showing Motion for Reconsideration of Senate Resolution 3 ..... A-37

Affidavit of Minnesota State Senator John Chenoweth Dated October 6, 1971 ..... A-38

Affidavit of Minnesota State Senator Edward Gearty Dated March 1, 1972 ..... A-39

Affidavit of Minnesota State Senator Earl Gustafson Dated March 4, 1972 ..... A-40

Affidavit of Minnesota State Senator Ralph Doty Dated March 4, 1972 ..... A-41

Affidavit of Minnesota State Senator A. J. Perpich Dated March 7, 1972 ..... A-42

TABLE OF AUTHORITIES

	PAGE
Constitutional Provisions:	
United States Constitution—	
Amendment XIV	2
Minnesota Constitution—	
Article IV, Section 1	8
Article IV, Section 2	16
Article IV, Section 23	16
Article IV, Section 13	9
Article III, Section 12	8
Statutes:	
28 U.S.C. §1253	10
28 U.S.C. §1343 (3)	2
28 U.S.C. §1343 (4)	2
28 U.S.C. §2201	2
28 U.S.C. §2202	2
28 U.S.C. §2281	2
28 U.S.C. §2284	2
42 U.S.C. 1983	2
42 U.S.C. §1988	2
Minnesota Statutes 1969, §2.021	17
Minnesota Statutes 1969, §2.021-2.712	3, 9, 15
Minnesota Statutes 1969, §2.031	10, 11, 12, 15, 17
Minnesota Statutes 1969, §2.031-2.712	2, 3
Minnesota Statutes 1969, §202.22-202.27	20
Minnesota Statutes 1969, §481.09	7
Rules:	
Federal Rules of Civil Procedure	
Rule 24 (b)	3
United States Supreme Court Rules	
Rule 15 (c)	11
Rule 16	2

PAGE

Cases:

Bailey v. Patterson, 369 U.S. 31, 33 (1962) 14
Butterworth v. Dempsey, 237 F. Supp. 302 (D. Conn. 1965) 17, 18
Connor v. Johnson, 265 F. Supp. 492 (D. Miss. 1967) 19
Davis v. Mann, 377 U.S. 678 (1964) 9
Ely v. Klahr, 403 U.S. 108 (1971) 13
Goldstein v. Cox, 396 U.S. 471 (1970) 10, 11, 13
Gunn v. University Committee, 399 U.S. 383 (1970) .. 11
Hecht v. Bowles, 321 U.S. 329 (1944) 18
Honsey v. Donovan, 236 F. Supp. 8 (D. Minn. 1964) 16
Kirkpatrick v. Preisler, 394 U.S. 526 (1969) 14
McGraw v. Donovan, 163 F. Supp. 184 (D. Minn. 1958) 16
McLean v. Burkinshaw, 107 F. 2d 665 (D.D.C. 1940) 8
Mitchell v. Donovan, 398 U.S. 427 (1970) 11
People v. Kerner, 33 Ill. 2d 460, 211 N.E. 2d 736 (1965) 19
Perez v. Ledesma, 401 U.S. 82 (1971) 13
Reynolds v. Sims, 377 U.S. 533 (1964) 9, 13, 14
Rockefeller v. Catholic Medical Center, 397 U.S. 820 (1970) 10, 11
Swann v. Adams, 385 U.S. 440 (1967) 9, 13, 14
Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1 (1971) 17, 18
Whitcomb v. Chavis, 403 U.S. 124 (1971) 9, 13, 14
Wold v. Anderson, 327 F. Supp. 1343 (D. Mont. 1971) 18

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1024

SIXTY SEVENTH MINNESOTA STATE SENATE,

Appellant-Intervenor,

vs.

RICHARD A. BEENS, PHILLIP KRASS, and LAWRENCE E. MEUWISSEN,

Appellees,

ARLEN ERDAHL, GEORGE B. HICKEY, CHARLES LeFEBVRE, JOSEPH W. NOTERMAN, and WILLIAM J. SCHNEIDER,

Appellees,

ROLLIN H. CRAWFORD, JAMES M. KING, and ROBERT C. VOSS,

Appellees-Intervenors.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MINNESOTA

MOTION OF APPELLEES TO DISMISS APPEAL OR AFFIRM PURSUANT TO SUPREME COURT RULE 16

MOTION

Plaintiff-appellees, Richard A. Beens, Phillip Krass, and Lawrence E. Meuwissen, hereby respectfully move this Court pursuant to Rule 16, United States Supreme Court Rules, for an Order dismissing the within appeal or, in the alternative, affirming summarily the Order of the United States District Court for the District of Minnesota, dated November 15, 1971, here appealed from. Plaintiff-appellees submit the attached Memorandum Brief in support of this motion.

COUNTER STATEMENT OF THE CASE

Plaintiff-appellees ("appellees"), residents and qualified voters of the State of Minnesota, residing in grossly malapportioned legislative districts, commenced this action in the United States District Court for the District of Minnesota on April 9, 1971. The jurisdiction of the Federal Court was founded upon 42 U.S.C. §§1983 and 1988 and 28 U.S.C. §§1343 (3) and 1343 (4).

The Complaint (A-2)* alleged the unconstitutionality of Minnesota Statutes, 1969, §§2.031 through 2.712, requested the convening of a Three-Judge Federal court pursuant to 28 U.S.C. §§2281 and 2284, and prayed for the following relief: (1) a declaratory judgment pursuant to 28 U.S.C. §2201 that Minnesota Statutes, 1969, §2.031 through 2.712 are invalid and void as being in violation of the Fourteenth Amendment to the United States Constitution; (2) an injunction pursuant to 28 U.S.C. §2202 restraining the defendant Secretary of State, and the defendant County Auditors, from conducting any future elections for members of the Minnesota Legislature from districts established by Minnesota Statutes,

*All references are to the Appendix attached hereto.

1969, §§2.031 through 2.712 until such time as the legislature established constitutionally valid districts; and (3) that the District Court, in the absence of the enactment by the Minnesota Legislature of a constitutionally valid plan of reapportionment, make a determination of a proper apportionment system for the State of Minnesota.

On or about June 25, 1971, the Chief Judge of the Eighth Circuit Court of Appeals designated the Three-Judge Court to hear and decide the case. Shortly thereafter, the District Court fixed a briefing schedule for arguments on the merits of the complaint, which schedule was to conclude on October 16, 1971.

By order dated October 14, 1971, appellants and appellees, Crawford, King and Voss were permitted, over the objection of appellees, to intervene in the action as additional defendants pursuant to Rule 24 (b), Federal Rules of Civil Procedure. That Order was based in part upon the representation by appellant's counsel that the proposed intervention would not delay the ultimate resolution of the action. (A-16).

The case came on for hearing on its merits on November 5, 1971. Thereafter, on November 15, 1971, the District Court made and entered its Order, the remedial part of which provides:

> "Having made the above findings of fact and law, the Court hereby:
>
> DECLARES: Minnesota Statutes 1969, §2.021 through 2.712 to be in violation of the Constitution of the United States.
>
> ORDERS: the defendants herein, including Arlen Erdahl, Secretary of State of the State of Minnesota and all County Auditors of the State of Minnesota, enjoined from holding or conducting any future elections under the present Apportionment Statutes.

ORDERS: the appointment of Professor Adams C. Breckenridge of Lincoln, Nebraska and Joseph T. Dixon, Jr. of Minneapolis, Minnesota as Special Masters to aid the Court in adopting a new plan of apportionment.

ORDERS: the adoption of the following schedule for proceeding with this matter:

November 12, 1971 — the final day for the parties and amici curiae to submit to the Court suggested criteria to be used by the Court in adopting a new plan of apportionment; the Court will thereafter announce the criteria it will utilize in reapportioning the State on the earliest possible date;

December 7, 1971 — the final day for the parties and amici curiae to submit to the Court proposals for reapportioning the State, such proposals to be consistent with the criteria previously announced by the Court;

December 21, 1971 — the final day for the parties and amici curiae to submit to the Court comments concerning the reapportionment proposals of the other parties and amici curiae; six copies of all suggested criteria, plans of reapportionment and comments with respect to other reapportionment proposals shall be provided to the Court and copies of each shall be served on each of the other parties and amici curiae.

Pursuant to said Order, each of the parties submitted proposed criteria for judicially ordered reapportionment plans and their objections to the criteria of others. Amici curiae Perpich (Lieutenant Governor) and Fena[1] submitted a pro-

[1] Rudy Perpich (Lieutenant Governor) and Representative Jack Fena were permitted to appear amicus curiae by order of the District Court dated November 26, 1971 (A-22).

posal to significantly reduce the size of the Minnesota Senate and House of Representatives. On November 26, 1971, the District Court issued an order adopting its criteria for reapportionment proposals to be made by the parties, suggesting that there might be some merit in the proposal of amici curiae Perpich and Fena to reduce the size of the Legislature, and permitting the parties and amici curiae to submit briefs on the issue. The District Court stated:

> "Parties, intervenors and amici desiring to submit briefs, shall file (6) six copies with the Clerk of Court in accordance with the time schedule outlined above. The briefs should be addressed to the following questions: (1) Is it within this Court's discretion to significantly reduce the size of the Senate and the House in this proceeding? (2) If the Court has discretion to take such action, should it exercise its discretion? (3) If the Court determines that a reduction in the size of the legislature is desirable, to what size should it reduce the Senate and House?

Argument on these issues was held on December 2, 1971. On December 3, 1971 the Court filed an order indicating its intention to apportion the Minnesota Legislature into 35 equally populated Senatorial Districts and 105 equally populated House Districts.[2]

Not until its final order and judgment of January 25, 1971, did the District Court adopt a plan calling for a reduced size Senate and House of Representatives.

---

[2] Contrary to appellant's assertion (Jurisdictional Statement, p. 5) these appellees did not contest the jurisdiction of the District Court to reduce the number of legislative districts. They merely opposed the exercise of that jurisdiction in this proceeding.

I

Appellant Lacks Authority and Standing to Prosecute this Appeal

Appellant Sixty Seventh Minnesota State Senate is an intervenor in the instant case by virtue of an order of the District Court dated October 12, 1971 (A-12) permitting it to intervene. The basis of that order was a Resolution adopted by the Minnesota State Senate, as Senate Resolution 3, on July 31, 1971. (A-34). Armed with that Resolution, appellant moved to intervene in the action some six months after its commencement and one month prior to the hearing on the merits of the case. At the hearing on the motion to intervene, appellant's counsel represented to the District Court that appellant would do nothing to delay the speedy resolution of the action. Based on that representation and on Senate Resolution 3, and over the objection of appellees, the petition to intervene was granted.

Senate Resolution 3 is broad in its terms. Nevertheless, it does not authorize Senate Counsel to prosecute the instant appeal.[3] By its terms, it directs the Office of Senate Counsel "to take such steps as may be necessary to represent the interests and will of this body to the extent deemed necessary in both state and federal court actions involving the prescription of the bounds of senatorial and representative districts, the apportionment of senators and representatives among those districts, and the orderly process of elections therefrom . . ."

Nowhere in the Resolution is there any expression of legis-

[3] Senate Resolution 3 was adopted on July 31, 1971 by a vote of 56 to 0. When the purpose for which it had been proposed was realized, a motion for reconsideration was made. The motion for reconsideration failed by a vote of 33 to 31, along strict political lines, October 12, 1971. (A-37)

lative policy with respect to the number of representative or senatorial districts. Similarly, nowhere in the Resolution is the Office of Senate Counsel authorized to take an appeal to the United States Supreme Court. Furthermore, the concern of the Senate, as expressed in Senate Resolution 3, covers only the prescription of the bounds of Senate and Representative districts and the apportionment of senators and representatives among those districts. There is no expressed concern with the size of the legislature. Simply put, the Sixty-Seventh Minnesota Senate, as a body, has not authorized the Office of Senate Counsel to take the instant appeal.

Minnesota Statutes 1971, §481.09 provides:

> "A Court, upon motion and hearing, and when reasonable grounds are shown, may require any attorney to prove his authority to appear, and, until such proof is made, may stay all proceedings by him on behalf of the party he assumes to represent. At any stage of the proceedings the court may relieve a party from the consequences of the unauthorized acts of an attorney, and, upon motion, may summarily compel such attorney to repair any injury resulting therefrom."

Following the filing of the Notice of Appeal in the case at bar, it became apparent that the Office of Senate Counsel speaks only for certain members of the Senate, and not for that body as a whole. At least one member of the Senate stated even before the District Court had ruled upon the Motion to Intervene that the Senate Counsel did not speak for him. See Affidavit of State Senator John Chenoweth (A-38). Subsequent to the appeal, several other Senators have taken the same position. See Affidavits of State Senators, Gearty, et al. (A-39 et seq.).

In addition, certain members of the Minnesota Senate have petitioned the District Court (following the entry of the final judgment on January 25, 1972) for permission to intervene. These Senators (J. A. Josefson, Lew W. Larson, Mel Hansen, C. J. Benson, Earl W. Renneke and John L. Olson) contend that they are not adequately represented by the Office of Senate Counsel. The Order of the District Court dated February 9, 1972, denying their motion to intervene has now been appealed to the United States Circuit Court of Appeals for the Eighth Circuit and has been docketed therein.

For all of the foregoing reasons, appellees contend that a majority of the members of the Minnesota State Senate do not favor the continuation of the instant appeal. It should therefore be dismissed. At a minimum, the Office of Senate Counsel should be required to show the authority by which it continues to prosecute the instant appeal. *McLean v. Burkinshaw*, 107 F. 2d 665 (D.D.C. 1939).[4]

Appellees also contend that the Sixty-Seventh Minnesota Senate is not a legal entity or a judicial person for purposes of intervention or appeal. Article IV, Section 1 of the Minnesota Constitution provides in part:

> "The legislature shall consist of the Senate and House of Representatives."

By this provision the Senate is only part of the Legislature. If any legislative body possesses the requisite authority to appear in this Court it is the Legislature as a whole, and not

---

[4] Appellees note that financing of the instant appeal is being done in violation of the Minnesota State Constitution. Article III, Section 12 thereof, in part provides:

> "No money shall be appropriated except by bill."

Senate Resolution 3 attempts to finance Senate participation in the instant case by Resolution in direct violation of this provision. For this Court to permit the appeal to proceed would be to acquiesce in that violation.

merely a part of it. That a Senate alone is not a legally cognizable entity in reapportionment is shown by Article IV, Section 13 of the Minnesota Constitution which provides in part:

> "The Legislature shall have the power to apportion anew senators, and representatives among the several districts according to the provisions of Section Second of this article."

The Senate does not apportion itself. Only the Legislature, as a whole, has the standing and authority to prosecute the instant appeal. Hence the appeal should be dismissed for lack of authority and standing to maintain it.

II

This Court Does Not Have the Jurisdiction of the Appeal, Pursuant to 28 U.S.C. §1253

The appeal in the case at bar is from a preliminary order of the United States District Court for the District of Minnesota dated November 15, 1971, declaring invalid the Minnesota legislative apportionment statutes, Minnesota Statutes, 1969, §§2.021 through 2.712 as being in violation of the Constitution of the United States. The basis for that declaration was a finding by the District Court that the legislative apportionment statutes failed to meet the Federal Constitution's Equal Protection standards as interpreted by this Court in *Swann v. Adams*, 385 U.S. 440 (1967); *Davis v. Mann*, 377 U.S. 678 (1964); *Reynolds v. Sims*, 377 U.S. 533 (1964); and *Whitcomb v. Chavis*, 403 U.S. 124 (1971).

Pursuant to its declaration that Minnesota Statutes, 1969, §§2.021 through 2.712 are unconstitutional and invalid, the

District Court ordered that the defendants, including the Secretary of State and all County Auditors were "enjoined from holding and conducting any further elections under the present apportionment statutes." Finally, the Court ordered the appointment of two Special Masters to aid the Court in formulating a new plan of apportionment and adopted a schedule for submission by the parties and others of proposed criteria for reapportionment and proposed plans of apportionment. The District Court did no more. (A-19).

The District Court did not enjoin the application of Minnesota Statutes 1969, §2.031 [5] as is contended by the appellant in its Jurisdictional Statement (pp. 3-4). A careful reading of the November 15, 1971 order of the District Court shows that it did declare §2.031 invalid, but enjoined future use of the apportionment statutes (§§2.041 through 2.712) only.

28 U.S.C. §1253, provides:

> "Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges."

In a series of recent cases, this Court has reviewed the history and purpose of that direct appeal statute and has concluded that the only direct appeals from interlocutory orders that this Court has power to hear under 28 U.S.C. §1253 are those granting or denying preliminary injunctions. *Goldstein v. Cox*, 396 U.S. 471 (1970).

Where no injunction of any kind is granted or denied, a direct appeal to this Court will not lie. *Rockefeller v. Catholic*

---

[5] "Subd. 1. The representatives in the senate and house . . . are apportioned . . . in 67 legislative districts."

Medical Center, 397 U.S. 820 (1970); *Mitchell v. Donovan*, 398 U.S. 427 (1970); *Gunn v. University Committee*, 399 U.S. 383 (1970).

Under the Rules of this Court, only questions set forth in the jurisdictional statement, or fairly comprised therein, will be considered on the appeal, Rule 15 (c), Supreme Court Rules. The only question presented by appellant in its Jurisdictional Statement (p. 4) is whether the District Court erred in enjoining the use of Minnesota Statutes, 1969, §2.031.[6] The order of November 15, 1971 shows no injunction against the use of Section 2.031. It shows only a declaration of invalidity of Section 2.031. The injunctive relief granted by the order runs only against the use of those sections of the statutes actually apportioning the various districts. (A-19).

Under the decisions of the Court in *Gunn v. University Committee, supra; Mitchell v. Donovan, supra; Rockefeller v. Catholic Medical Center, supra;* and *Goldstein v. Cox, supra*, the instant appeal should be dismissed.

As noted in *Gunn v. University Committee, supra:*

> "What we deal with here is no mere technicality. In *Goldstein v. Cox, supra*, we pointed out that: 'This Court has more than once stated that jurisdiction under the Three-Judge Court Act is to be narrowly construed since any loose construction of the requirement of [The Act] would defeat the purpose of Congress . . . to keep within narrow confines our appellate docket.' *Phillips v. United States* [312 U.S. 246], at 250. See *Stainback v. Mo Hock Ke Lok Po*, 366 U.S. 368, 375 (1949); *Moore v. Fidelity Deposit Co.*, 272 U.S. 317, 321 (1926); 396 U.S. at 478. But there are underlying policy considerations in this case more fundamental than mere economy of judicial resources.

[6] The Notice of Appeal states that it is "from the injunction issued . . . on November 15, 1971." (A-1).

> One of the basic reasons for the limit in 28 U.S.C. §1253 upon our power of review is that until a district court issues an injunction, or enters an order denying one, it is simply not possible to know with any certainty what the court has decided—a state of affairs that is conspicuously evident here . . ."

The Court went on to discuss the difficulties that can arise in determining what the court below has done when an appeal is taken prior to judgment. Similarly in the case at bar, there is nothing in the order of November 15, 1971 relative to a reduction in the size of the Minnesota Legislature about which appellant can complain on direct appeal. In short, that order is only a declaratory judgment insofar as it affects Minnesota Statutes, 1969, §2.031. The above cited cases make it clear that a declaratory judgment alone does not create a right of direct appeal to this Court.

Appellant, in its Jurisdictional Statement, does not contend that the old legislative districts were not unconstitutional. Appellants attempt to sustain the jurisdiction of this Court by the fiction that it is appealing from the order allegedly enjoining the operation of Minnesota Statutes 1969, §2.031. Appellant thus presents the claimed question of the constitutionality of that section. Yet a fair reading of the record as well as appellant's Jurisdictional Statement (See e.g. pp. 16-19) shows that the real question at issue is the authority of the District Court to order the adoption of a plan of legislative apportionment which plan includes, *inter alia*, a significant reduction in the number of legislative seats. However, the order of November 15, 1971 here appealed from does not make that reduction. Only the final judgment of January 25, 1972 makes the reduction. Only an appeal from that Judgment

would fairly present the question of the validity of the District Court's plan of apportionment. That is the teaching of *Goldstein v. Cox, supra*. Appellant has simply appealed prematurely and from the wrong order. See *Whitcomb v. Chavis*, 403 U.S. 124, 138 n. 19 (1971).

The mere fact that an injunction was ordered against the named defendants, prohibiting them from holding future elections in the old legislative districts, does not permit the appellant to take a direct appeal to this Court. The question of the size of the legislature is not a decision fairly encompassed within the injunctive order. Supreme Court Rule 15 (c).

Appellant relies on *Ely v. Klahr*, 403 U.S. 108 (1971); *Perez v. Ledesma*, 401 U.S. 82 (1971); *Swann v. Adams*, 385 U.S. 440 (1967) and *Reynolds v. Sims*, 377 U.S. 533 (1964) as cases which sustain the direct appeal jurisdiction of this Court. *Swann v. Adams, supra;* and *Reynolds v. Sims, supra*, were both decided prior to this Court's decision in *Goldstein v. Cox, supra*. In addition, *Swann v. Adams, supra*, was an appeal from a final order refusing to grant an injunction, and *Reynolds v. Sims, supra*, was an appeal from a final order granting an injunction. 377 U.S. at 522. They clearly came within the provisions of 28 U.S.C. §1253.

In *Perez v. Ledesma, supra*, this Court held that the final orders of a Three-Judge Court suppressing certain evidence were the equivalent of injunctive orders against the appellants, creating a right of direct appeal. 401 U.S. at 84. *Ely v. Klahr, supra*, was an appeal from a final order refusing to enjoin the enforcement of the Arizona Legislature's most recent effort to reapportion itself. 403 U.S. at 113-114. None of these cases sustained direct appeal jurisdiction from interlocutory declaratory judgments. Hence, they supply no authority in the instant case. For a recent example of this

Court's refusal to entertain an appeal from an interlocutory reapportionment order, see *Whitcomb v. Chavis*, 403 U.S. 124, 138 n. 19 (1971).

Based on the foregoing, the appeal should be dismissed.

III

The Judgment of the District Court Should Be Summarily Affirmed

This Court has held that where the invalidity of a state statute is clear, any further appeal from similar rulings should be summarily affirmed. *Bailey v. Patterson*, 369 U.S. 31 (1962).

In *Bailey*, this Court said:

> "We have settled beyond question that no State may require racial segregation of interstate or intrastate transportation facilities. *Morgan v. Virginia*, 328 U.S. 373; *Gayle v. Browder*, 352 U.S. 903; *Boynton v. Virginia*, 364 U.S. 454. The question is no longer open; it is foreclosed as a litigable issue. Section 2281 does not require a three-judge court when the claim that the statute is unconstitutional is wholly insubstantial, legally speaking, nonexistent. *Ex Parte Poresky*, 290 U.S. 30; *Bell v. Waterfront Commission*, 279 F. 2d 853, 857-858. We hold that three judges are not required when, as here, prior decisions make frivolous any claim that a state statute on its face is not unconstitutional." 369 U.S. at 33.

Appellees respectfully submit that under the decisions of this Court in *Whitcomb v. Chavis, supra; Swann v. Adams, supra; Reynolds v. Sims, supra; Kirkpatrick v. Preisler*, 394 U.S. 526 (1969), and the many other reapportionment deci-

sions of this Court, the Minnesota reapportionment statutes found in Minnesota Statutes 1969, §§2.021 through 2.712 are clearly unconstitutional. No party argues to the contrary, either here or in the District Court. Therefore, the order of the District Court for the District of Minnesota should be affirmed summarily, if this Court determines it has jurisdiction of the instant appeal.

Appellees' motion for affirmance is also predicated upon the fact that the instant appeal is taken only from the remedy ordered by the Court below. Even if it were conceded, *arguendo*, that Minnesota Statutes 1969, §2.031 were not unconstitutional, the final order of the District Court dated January 25, 1972, adopting a plan of reapportionment including a reduced size legislature would not be invalid.

There is no provision in the Minnesota Constitution fixing, immutably, the size of the Minnesota Legislature. The only basis for concluding that state policy calls for 67 legislative districts is that apportionment statutes since 1913 had prescribed that number of state senate districts. It is submitted, however, that the District Court was correct in ruling that there is no evidence that present state policy favors that number. Indeed there is evidence to the contrary, since the Governor of the State of Minnesota has recommended that the size of the legislature be reduced and also has vetoed a legislative plan which calls for continuation of the 67 Senate Districts. (A-32).

The mere fact that from 1913 to 1971 no change in the number of senate districts occurred does not create a state policy. It is noted that during most of that time (1913 to 1959) no legislative reapportionment of any kind occurred in Minnesota, contrary to the expressed provisions of Article IV, Sec-

tions 2 and 23 of the Minnesota Constitution.[7] Only after the decision of Judge Devitt, in the case of *McGraw v. Donovan*, 164 F. Supp. 184 (D. Minn. 1958), did the legislature reapportion the state at all.[8] State policy cannot be inferred from such unconstitutional legislative inaction. Furthermore, from statehood (1858) to 1913 there were eight reapportionments,[9] all of which changed the size of the legislature in one manner or

---

[7] Article 4, §2 states: "The number of members who compose the Senate and House of Representatives shall be prescribed by law, but the representation in the Senate shall never exceed one member for every 5,000 inhabitants, and in the House of Representatives one member for every 2,000 inhabitants. The representation in both houses shall be apportioned equally throughout the different sections of the state, in proportion to the population thereof. As amended Nov. 3, 1964."

Article 4, §23 states: "The legislature shall have the power to provide by law for an enumeration of the inhabitants of this State, and also have the power at their first session after each enumeration of the inhabitants of this State made by the authority of the United States, to prescribe the bounds of congressional, senatorial and representative districts, and to apportion anew the senators and representatives among the several districts according to the provisions of section second of this article. As amended Nov. 3, 1964."

[8] That reapportionment was based upon the 1960 population statistics and was adopted in 1959 legislative session. Thereafter there was no further reapportionment until the decision of a Three-Judge court in Honsey v. Donovan, 236 F. Supp. 8 (D. Minn. 1964). Then, in response to the opinion of then Circuit Judge Blackmun, a special session of the legislature adopted the reapportionment statute now found invalid in the present action.

[9] The District Court in footnote 2 of its Memorandum accompanying the December 3, 1971 Order noted that the size of the legislature has been changed ten times since 1857. The changes are as follows:

	Senate	House	Total
1857	37	80	117
1860	21	42	63
1866	22	47	69
1871	41	106	147
1881	47	103	150
1889	54	114	168
1897	63	119	182
1913	67	130	197
1917	67	131	198
1959	67	135	202
1968	67	135	202

another. No discernible state policy existed then or now,[10] Hence, the District Court acted properly and within its discretion in exercising its remedial equitable jurisdiction.

Appellant erroneously contends:

> "Of necessity, if the application of Minnesota Statutes, 1969, §2.031, prescribing the number of legislative districts, was erroneously declared violative of the Fourteenth Amendment and enjoined, the District Court lacked jurisdiction to issue its order of December 3, 1971, announcing its intent to reduce significantly the number of legislative districts (App. at A-6)." Jurisdictional Statement at p. 3. See also Id. at p. 6.

Appellants have cited no authority which would have required the District Court to be bound by Minnesota Statutes 1969, §2.031 even if it were constitutional. The District Court had the power to fashion the equitable remedy it deemed proper in the exercise of its discretion to correct past wrongs. *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 15 (1971). Nothing in Minnesota Statutes 1969, §2.031 could impinge on, or fetter that discretion. *Butterworth v. Dempsey*, 237 F. Supp. 302, 306 (D. Conn. 1965). This rule is especially applicable since §§2.021 and 2.031 were, by their terms, intended to last only until the next reapportionment.[11]

---

[10] Section 2.031 must be read in connection with Section 2.021 which provides: "For each legislature, until a new apportionment shall have been made, the senate is composed of 67 members and the house of representatives is composed of 135 members. Laws 1966, Ex. Sess. c. 1, §1." Read together they show that the number of legislative districts is fixed by the statute only until the next succeeding reapportionment. Unless read together each section lacks independent significance.

[11] See n. 10, supra.

As noted by this Court in *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 15 (1971):

> "Once a right and a violation has been shown, the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies."

See also *Hecht v. Bowles*, 321 U.S. 329, 330 (1944) where this Court said:

> "The essence of equity jurisdiction has been the power of the Chancellor to do equity and to mold each decree to the necessities of the particular case. Flexibility rather than rigidity has distinguished it. The qualities of mercy and practicality have made equity the instrument for nice adjustment and reconciliation between the public interest and private needs, as well as between competing private claims."

Wold v. Anderson, 327 F. Supp. 1343, 1344 (D. Mont. 1971), states the rule that:

> "It is the opinion of the court that neither a desire to maintain a given number of seats in the legislative bodies nor a desire to respect county lines will justify the imbalance created by [the apportionment statute] and we declare it to be unconstitutional."

Similarly in *Butterworth v. Dempsey*, 237 F. Supp. 302, 306 (D. Conn. 1965), the court said:

> "It is fundamental that state limitations—whether constitutional, statutory, or decisional—cannot bar or delay relief required by the Federal constitution. . . .

"It has been determined that the courts must use their powers as courts of equity to enforce the rights of the plaintiffs and those similarly situated even though it involves the deciding of political questions by the court." Id. at 308.

In devising its plan of apportionment, the District Court acted only to prevent a breakdown or disruption of the essential state government processes. It acted under its equitable jurisdiction called into play by legislative nonfeasance. Since the remedy adopted by the District Court is only provisional in nature, *People v. Kerner*, 33 Ill. 2d 460, 211 N.E. 2d 736 (1965), it can be overturned at any time by a constitutionally valid plan of apportionment adopted by the Minnesota Legislature, *Connor v. Johnson*, 265 F. Supp. 492 (D. Miss. 1967).

The District Court was well within its equitable discretion in fashioning its interim relief. Appellees' Motion to Affirm should be granted.

IV

Failure of This Court to Dismiss the Appeal or Affirm the Order of November 15, 1971 Will Work Great Hardship Upon the Electoral Process of the State

Pursuant to the request of plaintiff-appellees and all other parties except appellant, the District Court fashioned its equitable remedy with all deliberate speed, having in mind this Court's oft repeated desire to avoid disruption of a state's electoral process in legislative apportionment cases.

The general election for members of the Minnesota Legislature will take place on November 7, 1972. The primary election will take place on September 12, 1972. The time during which candidates may file for public office commences on July 5, 1972, and ends on July 18, 1972. The date by which a candidate must establish residency in a particular Senate or House District in order to be eligible to run for election in that District is May 7, 1972. Political party county conventions which make endorsements of candidates for legislative offices are to be held March 18 through March 26 (Democratic-Farmer-Labor party) and March 17 through March 25 and April 7 through April 15 (Republican party). The statutory first steps in the electoral process, the political party precinct caucuses have already been held on February 22, 1972. Minnesota Statutes, 1969, §§202.22 through 202.27.

For this Court to prolong the uncertainty inherent in the present delay by bringing the matter on for plenary consideration will work far greater havoc upon the legislative election process than any alleged error in the judgment of the District Court. If prospective candidates do not know what districts they must run in, many will hesitate to run at all and others will be unable to secure the political party endorsement necessary for their campaigns. Still others will not have sufficient time to move into the district of their choice. When combined with the detrimental effect of further delay upon the election machinery and officials, and the essentially provisional nature of the relief granted below, considerations expressed in *Ely v. Klahr*, 403 U.S. 108, suggest that the appeal be dismissed or the Order of November 15, 1971 be affirmed summarily.

Respectfully submitted,

ALAN W. WEINBLATT
228 Metro Square Building
Saint Paul, Minnesota
227-0768
Attorneys for Appellees
Beens, Kraus & Meuwissen

Of Counsel:
SYDNEY BERDE
BERDE, LEONARD
AND WEINBLATT

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

RICHARD A. BEENS, et al,

Plaintiffs,

vs.

ARLEN ERDAHL, Secretary of State of the State of Minnesota, et al,

Defendants,

THE SIXTY-SEVENTH MINNESOTA STATE SENATE,

Intervenor,

ROLLIN H. CRAWFORD, et al,

Intervenors.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

No. 4-71-Civ-151

Notice is hereby given that the Sixty-seventh Minnesota State Senate, the defendant in intervention above named, hereby appeals to the Supreme Court of the United States from the injunction issued in this action on November 15, 1971.

This appeal is taken pursuant to 28 U.S.C. § 1253.

Respectfully submitted,

H. BLAIR KLEIN
Senate Counsel
BRUCE CAMPBELL
Assistant Senate Counsel
Attorneys for defendant in intervention
231 State Capitol
Saint Paul, Minnesota 55155
Telephone: (612) 221-2511

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

RICHARD A. BEENS, PHILLIP KRASS, and LAWRENCE E. MEUWISSEN, individually and on behalf of All Citizens and Voters of the State of Minnesota similarly situate,

Plaintiffs,

vs.

ARLEN ERDAHL, Secretary of State of the State of Minnesota; GEORGE B. HICKEY, Hennepin County Auditor; CHARLES LeFEBVRE, Anoka County Auditor; JOSEPH W. NOTERMAN, Scott County Auditor; WILLIAM J. SCHNEIDER, Carver County Auditor, on behalf of themselves and all County Auditors of the State of Minnesota.

Defendants.

COMPLAINT

Plaintiffs above named for their cause of action allege and state as follows:

1. This Court has jurisdiction of the subject matter involved under and by virtue of the provisions of 42 U.S.C. §§ 1983 and 1988; 28 U.S.C. § 1343(3),(4); 28 U.S.C. § 2201, etc.

2. Plaintiffs request this Honorable Court to convene a three-judge Court to hear and determine this matter pursuant to the provisions of 28 U.S.C. §§ 2281 and 2284.

3. Plaintiffs are citizens and qualified voters of the United States of America and of the State of Minnesota residing in

various counties, legislative districts and congressional districts in the State of Minnesota as appears with greater particularity in Exhibit "A" which is attached hereto and made a part hereof by reference.

4. Plaintiffs bring this action on behalf of themselves and all other citizens and voters of the United States of America and the State of Minnesota similarly situated who have been denied equal protection of the laws as further stated herein. This class is so numerous as to make joinder impossible and impractical; there are common questions of law and fact which predominate over individual questions of law and fact; the claims of the named plaintiffs are typical of the claims of the members of this class; and these plaintiffs will fully and adequately represent and protect the interests of the class. In addition, the prosecution of separate actions by individual members of the class would create a risk of inconsistency or varying adjudications which would establish incompatible standards of conduct for the named defendants. The common question of law which predominates is the constitutionality of the scheme of legislative apportionment established by Laws 1966, Ex. Sess. c. 1, Minnesota Statutes 1969, §§ 2.031 through 2.712 inclusive.

5. The defendants are all citizens of the United States and of the State of Minnesota and reside within the State of Minnesota. Defendant Arlen Erdahl is the duly elected, qualified and acting Secretary of State of the State of Minnesota. Under the provisions of Minnesota Statutes 1969, chapters 203 through 211 inclusive, he is charged in his official capacity with the duty of keeping records of state elections, giving notice of state elections, receiving the filings of candidates for state offices, preparing ballots and instructions to voters, distributing copies of the election laws of the state, receiving

election returns, furnishing blank election ballots and forms to the several county auditors, furnishing certificates of election to legislative candidates in multi-county districts, serving on the State Canvassing Board, and various other election duties.

6. Defendant George B. Hickey is the duly qualified and acting Auditor of Hennepin County, State of Minnesota; defendant Charles LeFebvre is the duly qualified and acting Auditor of Anoka County, Minnesota; defendant Joseph W. Noterman is the duly qualified and acting Auditor of Scott County, Minnesota; defendant William J. Schneider is the duly qualified and acting Auditor of Carver County, Minnesota.

7. This action is brought against the aforesaid County Auditors individually and as representatives of all other county auditors similarly situated in the State of Minnesota; such persons are so numerous as to make it impracticable to bring them all before the Court by way of joinder; there is a predominating common question of law, to wit: the constitutionality of the legislative apportionment scheme directed by Laws 1966, Ex. Sess. c. 1, Minnesota Statutes 1969, §§2.031 through 2.712; the defenses of the representative parties are typical of the defenses of the class of county auditors; the representative parties will fairly and adequately protect the interests of the class; and the prosecution of separate actions against individual members of the class would create a risk of inconsistent or varying adjudications which would establish incompatible standards of conduct for plaintiffs.

8. Said county auditors are charged with various election duties in their respective counties including but not limited to preparation of ballots, furnishing of ballots, canvassing of returns of legislative elections; providing certificates of elec-

tion to successful legislative candidates in single county legislative districts; certifying to the Secretary of State the results of the canvass in their respective counties and various other miscellaneous duties with respect to primary and general elections.

9. This case arises under the Fourteenth Amendment, Section 1 to the Constitution of the United States which provides in pertinent part:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The provisions thereof guaranty to the citizens of each state the right to vote in State and Federal elections and that the vote of each shall be equally effective with any other vote cast in such elections. A state statute which effects an apportionment which invidiously discriminates against voters in highly populous districts and prefers other voters in the least populous districts violates the above quoted constitutional provisions.

10. Article IV, Section 2 of the Minnesota State Constitution provides:

> "The number of members who compose the Senate and House of Representatives shall be prescribed by law, but the representation in the Senate shall never exceed one member for every five thousand inhabitants, and in the House of Representatives, one member for every two thousand inhabitants. The representation in both houses shall be apportioned equally throughout the sections of the state, in proportion to the population thereof."

11. Article IV, Section 23 of the Minnesota State Constitution provides:

> "The legislature shall have the power to provide by law for an enumeration of the inhabitants of this state and also have the power at their first session after each enumeration of the inhabitants of this state made by the authority of the United States, to prescribe the bounds of congressional, senatorial and representative districts, and to apportion the new senators and representatives among the several districts according to the provisions of section Second of this Article."

12. Plaintiffs as citizens of the United States and of the State of Minnesota have the right conferred by the above provisions of the Minnesota Constitution to have the entire membership of the Minnesota Legislature apportioned and elected on the basis of the 1970 Federal Census. The intent and purpose of the aforesaid provisions of the Minnesota Constitution is to require that the members of the Legislature be elected by the people of the State of Minnesota on a basis of equal representation of the individual electors in the state and that the Minnesota State Senators and Representatives must be equally apportioned throughout the state in districts which are arranged in proportion to the number of inhabitants therein.

13. The United States Census for 1970 shows that the state legislative districts as established by the State Legislature in Laws 1966, Ex. Sess. c. 1, are now unequally apportioned; that despite the compilation of said Census, the Legislature has failed and neglected to reapportion the legislative districts in the State of Minnesota; and the present apportionment of the state legislative districts is not based upon any

logical or reasonable formula whatsoever, but is arbitrary and capricious.

These plaintiffs are residents, citizens and voters of certain counties the population of which has increased since the last census at a rate greater than the state as a whole. Exhibit "B" attached hereto and made a part hereof by reference shows that between 1960 and 1970 the population of the State of Minnesota increased by 11.5 percent. However, the increase in population in Anoka County, the residence of plaintiff Beens, was 79.9 percent; in Scott County, the residence of plaintiff Meuwissen was 48.0 percent and in Carver County, the residence of plaintiff Krass was 32.5 percent. Other counties in which there has been a major increase in population greater than that of the state include Dakota County, 78.5 percent; Sherburne County, 42.6 percent and Washington County, 58.2 percent. The present population of each county and of the entire state, as determined by the 1970 Federal Census, appears more fully in Exhibit "B". The present population of each legislative district as now prescribed by Minnesota Statutes 1969, §§ 2.031 through 2.712 inclusive, appears more fully in Exhibit "C" which is attached hereto and made a part hereof by reference. The ideal population for each Representative District is 28,155. The ideal population for each Senate District is 56,792.

14. The unequal representation reflected in Exhibit "C" deprives plaintiffs and all other voters of the highly populated districts of the rights guaranteed to them by the Fourteenth Amendment to the Constitution of the United States including the rights of due process of laws and the equal protection of the laws. It further deprives them of their rights as guaranteed by the above quoted provisions of the Minnesota State Constitution.

15. The common relief sought against all parties in their official capacities relates to their respective jurisdictions in carrying out the election laws of the State of Minnesota with respect to the election of senators and representatives of said State Legislature calling for elections therefore; the appointment of election judges therefore; the registration of qualified voters therefore; the holding of elections therefore; the certifying of the result of said election; the preparation of ballots therefore, and the taking of all steps necessary to hold all elections both nominating and general, and all matters relating to the election of state representatives and senators to the Minnesota State Legislature.

16. The plaintiffs are informed and believe and therefore allege that the Legislature of the State of Minnesota will not pass a law reapportioning itself in conformity with the United States Constitution and the Constitution of the State of Minnesota during the 1971 Legislative Session. The plaintiffs further allege on information and belief that all of the defendants intend to and will, unless sooner restrained by an order of this Court, conduct the election for the next legislature, namely the 1973 Legislature, during the year 1972, on the basis of the senatorial and representative districts described by Minnesota Statutes §§ 2.031 through 2.712, and that until there is legislative reapportionment defendants will continue to do so in subsequent elections of members of the Minnesota State Legislature.

Plaintiffs further allege that they intend to and will vote in the State primary and general election in 1972 and thereafter for candidates for State legislative offices; and that said elections conducted in accordance with Minnesota Statutes §§ 2.031 through 2.712 will continue to deprive plaintiffs of their rights guaranteed under the Constitution of the United States and of the State of Minnesota.

17. In the absence of reapportionment of the legislative districts of the State of Minnesota in conformity with the Minnesota Constitution, any action of these defendants in conducting an election for members of the Minnesota Legislature in accordance with the districts prescribed by Minnesota Statutes §§ 2.031 through 2.712, has deprived and will continue to deprive plaintiffs of their constitutional rights in that:

(a) They are and will be arbitrarily deprived of liberty and property without due process of law, and are and will be arbitrarily deprived of the equal protection of the laws in violation of the Fourteenth Amendment to the Constitution of the United States.

(b) They are and will be deprived of liberty and property contrary to Article I, Section 7 of the Minnesota Constitution.

(c) They are and will be in substantial measure, disenfranchised and deprived of their rights and privileges, all in violation of Article I, Section 2 of the Minnesota Constitution.

(d) They are and will be deprived of an equally apportioned state legislature as guaranteed by Article 4, Sections 2 and 23 of the Minnesota Constitution.

(e) Their right to vote, as guaranteed by Article 7 Section 1 of the Minnesota Constitution, is and will continue to be abridged, diluted and infringed.

18. By reason of the failure of the Legislature of the State of Minnesota to reapportion the legislative districts of the state in conformity with the Minnesota Constitution, thus violating the constitutional rights of these plaintiffs and of all other members of the class of citizens and voters whom they represent, a justiciable controversy exists.

WHEREFORE, Plaintiffs respectfully pray that this Honorable Court take jurisdiction of this matter; that a special three-judge court be called to hear and determine this action as by law provided in 28 U.S.C. § 2281, et seq. and declare the rights of these plaintiffs pursuant to 28 U.S.C. § 2201 in the premises to wit:

(a) That the present legislative apportionment of the State of Minnesota has deprived and continues to deprive the plaintiffs of liberty and property without due process of law and has denied and continues to deny the plaintiffs' equal protection of the law in violation of the Fourteenth Amendment to the Constitution of the United States.

(b) That Minnesota Statutes 1969, §§ 2.031 through 2.712 are void and invalid as being contrary to the Fourteenth Amendment to the Constitution of the United States, and the Constitution of the State of Minnesota because of the failure to reapportion the legislative districts of the State of Minnesota in accordance with present population distribution as herein alleged.

(c) That the right of the plaintiffs to vote as guaranteed by Article 1, Section 2 and Article 7, Section 1 of the Constitution of the State of Minnesota has been impaired.

Plaintiffs further pray that after hearing of this action, The Court grant further relief in accordance with 28 U.S.C. § 2202, and that it:

(a) Restrain the defendants from furnishing forms for nominations, from receiving nominations and petitions and papers, from certification of nominations or elections, and from any other acts necessary to the holding of elections for members of the Minnesota Legislature in districts as established by Minnesota Statutes 1969, §§ 2.031 through 2.712 until such time as said Legislature enacts legislation reappor-

tioning the state senatorial and representative districts according to the Constitution of the State of Minnesota.

(b) Notify the Legislature of the State of Minnesota presently in session, that this Court shall retain jurisdiction of this cause during the terms of such legislature to determine at the end thereof whether any new apportionment system has been devised to meet the requirements of the Fourteenth Amendment to the Constitution of the United States and the provisions of the Constitution of the State of Minnesota and for further hearings herein to determine the validity of any new apportionment law as may be enacted; and in the absence of the enactment of a constitutionally valid method of apportionment by said Legislature that this Court will make a determination of a proper apportionment system for the State of Minnesota.

Further plaintiffs pray that the Court grant such other and further relief as to this Court may seem just and proper.

Dated: April 9, 1971.

BERDE, LEONARD &
WEINBLATT
By Alan W. Weinblatt
Attorneys for Plaintiffs
710 Degree of Honor Building
St. Paul, Minnesota 55101
227-0768

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION
No. 4-71-Civ. 151

RICHARD A. BEENS, PHILLIP KRASS, and LAWRENCE E. MEUWISSEN, individually and on behalf of All Citizens and Voters of the State of Minnesota similarly situate,

Plaintiffs,

vs.

ARLEN ERDAHL, Secretary of State of the State of Minnesota; GEORGE B. HICKEY, Hennepin County Auditor; CHARLES LeFEBVRE, Anoka County Auditor; JOSEPH W. NOTERMAN, Scott County Auditor; WILLIAM J. SCHNEIDER, Carver County Auditor, on behalf of themselves and all County Auditors of the State of Minnesota,

Defendants.

MEMORANDUM ORDER

Plaintiffs seek several kinds of relief in this action. They have asked the three judge court to issue a declaratory judgment which in effect would declare the Minnesota legislature to be unconstitutionally apportioned; to restrain the defendants from any acts necessary for the holding of an election; and, in the absence of action by the Minnesota legislature, to judicially reapportion that body. They assert that this is a class action and that they represent all the citizens of the State

of Minnesota who have been denied their constitutional rights by virtue of the present scheme of apportionment.

There are two separate motions to intervene, pursuant to Rule 24 F.R. Civ. P., now before this Court. The first to be considered will be that of the Minnesota Senate. Their motion is opposed by the plaintiffs on the grounds that it is not timely; that the applicant has no interest in the case; and that whatever interest the Senate might have would be adequately protected by the present plaintiffs.

Even though their motion is quite late, especially in light of the time pressures which are inherent in a reapportionment case, the Senate will be allowed to intervene. Intervention is to be liberally granted under Rule 24. *Peterson v. U.S.*, 41 F.R.D. 131 (D. Minn. 1966); 2 Barron & Holtzoff, Federal Practice & Procedure § 591. Intervenor's counsel have assured this Court that their brief is already prepared and that their intervention will not occasion any delay in hearing this case. Thus they come within the liberal intervention standards set out by the Eighth Circuit in *Kozak v. Wells*, 278 F. 2d 104 (8th Cir. 1960). There the court allowed intervention even though the motion was made almost a year after filing of the complaint. In *Kozak* the court said, "Timeliness is to be determined from all the circumstances shown." P. 109. One of the primary "circumstances" influencing the *Kozak* court was the lack of prejudice caused by the intervention.

Here there is no allegation that any of the parties will be prejudiced by intervention at this point. The intervenor will not delay the adjudication of this controversy. Thus the circumstances indicate that intervention should be allowed.

Likewise, the Senate has an interest in this case, since it will be directly affected by its outcome. In a similar situation the

California Senate was held to have a sufficient interest to intervene. *Silver v. Jordan*, 241 F. Supp. 576 (S.D. Cal. 1964). Plaintiffs' attempt to distinguish *Silver* is without merit. The fact that only one house of the legislature was there being challenged is not determinative. The Minnesota Senate has just as much interest in its makeup here, where both houses are challenged, as the California Senate had there, where only one was challenged.

Moreover, in at least one other reapportionment case the legislature was made a party. In *Dungan v. Sawyer*, 250 F. Supp. 480 (D. Nev. 1965), a three judge court had such strong feelings about the legislature's interest that the Nevada legislature was joined as a party on the motion of the court. In light of these precedents it would be inappropriate to say that the Senate has no interest in the case.

Therefore, it is hereby ordered that the Minnesota Senate be allowed to intervene. However, intervention is subject to the requirement that any pleadings or briefs be served upon plaintiffs' counsel upon receipt of this Order, after which plaintiffs will serve any reply by October 27, 1971.

Three individuals also seek to become parties to the suit. They ask, pursuant to Rule 23(c)(1), for a determination as to the propriety of this suit's continuance as a class action. If it is determined to be a proper class action, they seek to enter an appearance through their own counsel as allowed by Rule 23(c)(2)(C). In the alternative, if there is a determination that it is not a proper class action, they request permission to intervene under the provisions of Rule 24.

Rule 23(c)(1) requires a determination of whether an action brought as a class action may be so maintained. Plain-

tiffs assert that this is a class action because there is a "common question of law which predominates." However, the "common question of law" finding is not the only one which a court must make before allowing a class action of this type to proceed. The class action approach must also be superior to other available methods for the fair and efficient adjudication of the controversy. Rule 23(b)(3).

One of the factors which must be considered in determining if a class action is the best method is whether difficulties are likely to be encountered in the management of the class. If this action is allowed to proceed as a class action, it would be totally unmanageable. There are stringent notice requirements for a Rule 23(b)(3) class action. See Rule 23(c)(2). In this case notice would require a great deal of time, to say nothing about the tremendous expense of notifying every registered voter in the State of Minnesota. To allow this suit to be maintained would also open the door to uncontrollable delay, since many might seek to enter individual appearances, as is allowed by Rule 23(c)(2)(C). More parties mean more briefs, thus making not only the ultimate decision by the three judge court more difficult, but also making briefing schedules and other administrative details almost impossible.

The fact that this action is not maintainable as a class action, at least as to the alleged class of plaintiffs, will have no effect on its outcome. Few if any of the prior reapportionment cases have been class actions. Any declaration as to the validity or invalidity of the present apportionment or subsequent redistricting plan which the three judge court may have to adopt will be equally valid and enforceable whether there are three or several hundred thousand plaintiffs.

Thus petitioners Crawford, King, and Voss are not members of the class since no class exists, and they will not be allowed to enter an appearance. However, they will be allowed to intervene under Rule 24(b), since their claims and those in the main action have questions of law in common. However, intervention is subject to the requirement that any pleadings or briefs be filed by October 20, 1971, after which plaintiffs will have until October 27, 1971, to reply.

These motions to intervene are only granted because they will not delay prosecution of this action. Time is of the essence here. Any further motions to intervene will delay this action. Any delay would be extremely prejudicial to plaintiffs, and therefore this Court is strongly inclined to deny any other motions for intervention.

October 14, 1971.

EARL R. LARSON
United States District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION
No. 4-7-Civ. 151

RICHARD A. BEENS, et al,

Plaintiffs,

vs.

ARLEN ERDAHL, Secretary of State of the State of Minnesota, et al,

Defendants,

THE SIXTY-SEVENTH MINNESOTA STATE SENATE,

Intervenor,

ROLLIN H. CRAWFORD, et al,

Intervenors.

DEMOCRATIC FARMER LABOR PARTY OF MINNESOTA, et al,

Amicus Curiae.

FINDINGS AND ORDER

In light of the submission of pleadings and briefs by all the parties, the hearing held November 5, 1971 before this Court and the filing by the parties of a Stipulation to the relevant statistics, data and computations with respect to the present apportionment of the Minnesota Legislature, the Court makes the following findings:

1. This three-judge Court has proper jurisdiction of the subject matter of this lawsuit. 28 U.S.C. §1343(3), (4); 42 U.S.C. §1983; 28 U.S.C. §2201, et seq.; 28 U.S.C. §2281;

Swann v. Adams, 385 U.S. 440 (1967); *Reynolds v. Sims*, 377 US. 533 (1964).

2. The present apportionment of the Minnesota Legislature, as set out in Minnesota Statutes 1969 §§2.021 through 2.712, when applied in light of the 1970 Federal Census results in: a deviation of 25% or more from the population norm of 56,792 per Senatorial District in 17 of the 67 Senatorial Districts; a deviation of 15% or more in 36 of the 67 Senatorial Districts; the ability of 41.67% of the population of the State of Minnesota to elect a majority of the State Senators; a ratio of 2.49 to 1 between the most populated Senatorial District (District 12—97,760) and the least populated Senatorial District (District 40—39,332); a deviation of 25% or more from the population norm of 28,185 per House District in Districts electing 37 of the 135 members of the State House of Representatives; a deviation of 15% or more in Districts electing 72 of the 135 members of the State House of Representatives; the ability of 40.66% of the population of the State of Minnesota to elect a majority of the members of the State House of Representatives; and a ratio of 3.57 to 1 between the most populated House District (District 12B—60,596) and the least populated House District (District 23A—16,974).

3. The current apportionment of the Minnesota Legislature, giving rise to the disparities enumerated above, clearly fails to meet the standards of the United States Constitution as interpreted by the Supreme Court. See, *e.g.*, *Swann v. Adams*, 385 440 (1967); *Davis v. Mann*, 377 U.S. 678 (1964); *Reynolds v. Sims*, 377 U.S. 533 (1964). See also, *Whitcomb v. Chavis*, —— U.S. ——, 29 L. Ed. 2d 563, Part VII (June 7, 1971).

4. The Minnesota Legislature adjourned *sine die* on October 30, 1971, and is not scheduled to reconvene until after the

1972 General Elections. Since there is no present reason to believe that the State will enact a new plan of legislative apportionment prior to the 1972 General Elections, this Court finds that it should proceed to adopt an apportionment plan which will pass constitutional muster in time to be implemented in the 1972 General Elections.

Having made the above findings of fact and law, the Court hereby:

DECLARES: Minnesota Statutes 1969, §§2.021 through 2.712 to be in violation of the Constitution of the United States.

ORDERS: the defendants herein, including Arlen Erdahl, Secretary of State of the State of Minnesota and all County Auditors of the State of Minnesota, enjoined from holding or conducting any future elections under the present Apportionment Statutes.

ORDERS: the appointment of Professor Adam C. Breckenridge of Lincoln, Nebraska and Joseph T. Dixon, Jr. of Minneapolis, Minnesota as Special Masters to aid the Court in adopting a new plan of apportionment.

ORDERS: the adoption of the following schedule for proceeding with this matter: November 12, 1971—the final day for the parties and amici curiae to submit to the Court suggested criteria to be used by the Court in adopting a new plan of apportionment; the Court will thereafter announce the criteria it will utilize in reapportioning the State on the earliest possible date; December 7, 1971—the final day for the parties and amici curiae to submit to the Court proposals for reapportioning the State, such proposals to be consistent with the criteria previously announced by the Court; December 21, 1971—the final day for the parties and amici curiae to submit to the Court comments concerning the reapportionment pro-

posals of the other parties and amici curiae; six copies of all suggested criteria, plans of reapportionment and comments with respect to other reapportionment proposals shall be provided to the Court and copies of each shall be served on each of the other parties and amici curiae.

November 15, 1971.

EARL R. LARSON
United States District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION
4-71-Civil-151

RICHARD A. BEENS, et al

vs.

ARLEN ERDAHL, et al

ORDER

The Court having entered its findings and order, dated November 15, 1971, declaring the present legislative apportionment statute of Minnesota, M.S.A. §§2.021 through 2.712, to be invalid and in violation of the Constitution of the United States and enjoining the conduct of future elections thereunder,

NOW THEREFORE, the Court states its intention to adopt a plan of apportioning the Minnesota legislature so that each House and Senate District, for occupancy by a single member, and not overlapping, shall consist of a compact and contiguous

area of equal population according to the latest available 1970 census figures which, subservient to the basic principle of equality of population, will respect the integrity of existing boundaries of political subdivisions of the State. Minor deviations not to exceed two percent will be considered if they facilitate the maintenance of such boundaries, but no consideration will be given to the residence of incumbent legislators or the voting pattern of electors. Population estimates will not be an acceptable method of computing the size of a legislative district. Each legislative district must consist of identifiable units from the corrected third count of tapes of the 1970 Federal Census.

Proposals to reduce the size of the Senate and the House have been submitted to the Court. They have sufficient merit to justify the Court in holding further hearings on this subject. Accordingly, and for the reasons more fully set forth in the attached memorandum, the Court will accept additional briefs on this issue from parties, intervenors and amici on or before 5:00 P.M., Wednesday, December 1, 1971, and will hear oral argument on the issue at 2:00 P.M., Thursday, December 2, 1971, in the Courtroom of the Honorable Edward J. Devitt, Federal Court House, St. Paul, Minnesota. The Court will permit additional amici to file briefs on the matter.

Parties, intervenors and amici desiring to submit briefs shall file six (6) copies with the Clerk of Court in accordance with the time schedule outlined above. The briefs should be addressed to the following questions: (1) Is it within this Court's discretion to significantly reduce the size of the Senate and the House in this proceeding? (2) If the Court has discretion to take such action, should it exercise its discretion? (3) If the Court determines that a reduction in the size of the

legislature is desirable, to what size should it reduce the Senate and House?

It is further ORDERED that: the Motion of Jack Fena and Rudy Perpich for leave to appear as amicus curiae for the purpose of submitting a plan of apportionment is hereby granted.

It is further ORDERED that the Motion of the Americans for Democratic Action, Minnesota Chapter, for leave to file a brief as amicus curiae on the question of staggered senatorial terms is hereby granted, provided that such brief is filed with this Court by December 1, 1971. Parties, intervenors and other amici are invited to file briefs on this issue.

It is further ORDERED the Motion to dismiss Joseph Dixon as a Master, filed by Intervenors Crawford, King and Voss, is hereby denied.

Dated: November 26, 1971.

GERALD W. HEANEY
Judge
United States Court of Appeals

EDWARD J. DEVITT
Chief Judge
United States District Court

EARL R. LARSON
Judge
United States District Court

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION
4-71-Civil-151

RICHARD A. BEENS, et al.

vs.

ARLEN ERDAHL, et al.

MEMORANDUM IN SUPPORT OF ORDER

We are persuaded that there is sufficient merit to the argument that the size of the Minnesota Legislature should be significantly reduced to permit additional briefs and argument.

If a plan of reapportioning the State had been adopted by the Legislature and approved by the Governor, we would be primarily concerned with whether the plan apportioned the State into legislative districts of equal size, and whether the districts were compact and contiguous. But no plan has been presented to us, and we have the task of apportioning the State Legislature.

While it is argued that our authority is limited to accepting the present number of Senate and House Districts, a persuasive argument has been made to the contrary. And we must state frankly that we are reluctant to proceed to apportion the State on the basis of 67 Senate Districts and 134 House Districts, and that we have a present preference to apportion both houses into a lesser number of districts.

It is clear that in situations such as this, where the Court has been forced to adopt its own plan of apportionment as opposed to merely passing on the constitutionality of a state-

enacted plan, we have greater flexibility and discretion in fashioning an appropriate remedy and must view our task in a different light. For example, while the Supreme Court has consistently approved legislatively enacted multi-member districts, *Whitcomb v. Chavis*, 403 U.S. 124 (1971); *Burns v. Richardson*, 384 U.S. 73 (1966); *Forson v. Dorsey*, 379 U.S. 433 (1965); *Burnette v. Davis*, 382 U.S. 42 (1965), it has recently stated:

> "The District Court's judgment was that single-member districting would be ideal for Hinds County. We agree that when district courts are forced to fashion apportionment plans, single-member districts are preferable to large multi-member districts as a general rule."

Connor v. Johnson, 402 U.S. 690, 692 (1971). Here, the question is whether our discretion extends to reducing the size of the Legislature.

It appears that our discretion is not fettered by state constitutional or statutory provisions. The Minnesota Constitution contains no provisions fixing the number of legislators at its present level, and the statute establishing the present size states that the number of legislators shall remain so fixed "until a new apportionment shall have been made * * *." *Minnesota Statutes 1969*, §2.021.

In support of the argument that the size of the Minnesota Legislature should be reduced, it is pointed out that the Minnesota Senate, of 67 members, is the largest in the nation and the Minnesota Legislature is the eighth largest in the nation;[1]

---

[1] The Citizens' Conference on State Legislatures, which recently published a study of all fifty legislatures, rated the Minnesota State Legislature tenth highest in overall characteristics. The legislatures were evaluated on functional efficiency, accountability, independence, representativeness, and state of informedness of the legislators. Even though the Minnesota Legislature ranked tenth overall, the number one recommendation of the Conference for improving the Legislature was to reduce its size. CITIZENS CONFERENCE ON STATE LEGISLATURES, THE SOMETIMES GOVERNMENT, 1971, at 239.

that the Governor of the State of Minnesota recommended, in a special message, that the size of the Legislature be substantially reduced;[2] that the size of the Minnesota Legislature has varied from time to time;[3] and that the respected "Minnesota Poll" reported on January 10, 1971, that fifty-two per-

---

[2] Governor Wendell R. Anderson, noting that "** * the unusual size of the Legislature in Minnesota makes it cumbersome, and it is certainly true that other states are able to carry out their legislative responsibilities with fewer members, * * *" recommended that the Legislature take steps to reduce its size. The Governor also recognized that a legislature is not likely to reduce its own size voluntarily. Governor Wendell R. Anderson, *Ethics in State Government and Legislative Reform*, a Special Message to the 67th Session of the Legislature of Minnesota, March 23, 1971.

This latter view was shared by the Honorable Chris L. Erickson, a Minnesota State Senator from 1951 to 1963 and Chairman of the Senate's Committee on Elections and Reapportionments during his last term of office, who submitted a statement to this Court relative to the size of the Legislature. Mr. Erickson expressed the view that a reduction in the size of the Legislature would be of great benefit to the public and further indicated that, in view of the Legislators' reluctance to vote themselves out of office, such a reduction could be accomplished only by the courts.

[3] The size of the Legislature has been changed ten times since 1857. In 1860, the size was reduced from 117 to 63. Since 1860, the size of the Legislature has been consistently increased. The changes are as follows:

	Senate	*House*	*Total*
1857	37	80	117
1860	21	42	63
1866	22	47	69
1871	41	106	147
1881	47	103	150
1889	54	114	168
1897	63	119	182
1913	67	130	197
1917	67	131	198
1959	67	135	202
1966	67	135	202

1957-58 Minnesota Legislative Manual 127; Laws 1913, Ch. 91; Laws 1917, Ch. 217; Laws 1959, Ch. 45; Laws 1966 Extra Session, Ch. 1.

cent of all Minnesota adults favor a reduction in size of the Minnesota Legislature.[4]

It is also argued that a smaller legislature could be better housed and better staffed without additional expenditures, and that improved transportation and communication make larger Senate and House Districts feasible. Finally, it is urged that a smaller number of Senate and House Districts would reduce the necessity for artificial boundary arrangements in the metropolitan areas of the State.

Arguments against reducing the size of the Legislature have not been presented to this Court, perhaps because the petition in support of a reduction was not filed until November 17, 1971. While the Court is generally familiar with these arguments, it feels that opponents of reduction ought to have an opportunity to present them to the Court.

The Court now has the responsibility for apportioning the Minnesota State Legislature in accordance with the Constitution of the United States. It intends to fulfill that responsibility in the way that will best meet the needs of the people of the State. The Minnesota Legislature can always change what we do in this proceeding, but the people of the State may have to live with the apportionment plan prepared by this Court for some years. We want the plan which we devise to be the best possible.

---

[4] The poll of January 10, 1971, showed that fifty-two percent of all adults favored a reduction in the size of the Legislature. Fifty-seven percent of DFL'ers, forty-seven percent of Republicans, and fifty percent of independents favored reduction.

Thirty-four percent of all adults opposed a reduction of the Legislature's size. Thirty-three percent of DFL'ers, thirty-seven percent of Republicans, and thirty-five percent of independents were among those opposed.

No opinion on the subject was held by fourteen percent of all adults, ten percent of DFL'ers, sixteen percent of Republicans, and fifteen percent of independents. MINNEAPOLIS TRIBUNE, January 10, 1971.

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION
4-71-Civil-151

RICHARD A. BEENS, et al.

vs.

ARLEN ERDAHL, et al.

ORDER

On November 15, 1971, this Court declared the present legislative apportionment statute of Minnesota, M.S.A. §§2.021 through 2.712, to be invalid and in violation of the Constitution of the United States, and enjoined the conduct of future elections thereunder.

On November 26, this Court established the criteria that would be followed by this Court in reapportioning the Legislature, and asked the parties, intervenors and amicus curiae to submit briefs and to argue orally questions relating to the number of Senate and House Districts into which the State should be apportioned. Oral argument was held on December 2, 1971.

NOW THEREFORE, the Court finds that it best can fulfill its duty of apportioning the Minnesota Legislature in accordance with the Constitution of the United States and with due regard for State policy by:

Dividing the State into 35 equally-populated Senatorial Districts having a population norm of 108,713.

Dividing each Senatorial District into three equally-populated House Districts, having a population norm of 36,238, thus providing for a total of 105 House Districts.

It is, therefore, ORDERED that parties, intervenors and amicus curiae may present plans for apportioning the Legislature in accordance with the criteria set forth in the order of November 26 and the order of today, on or before December 27, 1971, and that they may submit comments on the plans of others on or before January 3, 1972.

It is further ORDERED that the motions of the Americans for Democratic Action, insofar as it asks this Court to require staggered terms for senators, is denied.

It is further ORDERED that the motion of the Minnesota Farmers Union for leave to intervene is denied, but that it is given the right to participate in this proceeding as amicus curiae.

Dated: December 3, 1971.

GERALD W. HEANEY
Judge
United States Court of Appeals

EDWARD J. DEVITT
Chief Judge
United States District Court

EARL R. LARSON
Judge
United States District Court

(Filed Dec. 3, 1971. — Harry A. Sieben, Clerk, by Eleanor Mollner, Deputy.)

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION
4-71-Civil-151

RICHARD A. BEENS, et al.

vs.

ARLEN ERDAHL, et al.

MEMORANDUM IN SUPPORT OF ORDER

We have the unrequested burden of reapportioning the Minnesota Legislature. It is a task that the legislative and executive branches of the State can relieve us of by apportioning the Legislature in accordance with the United States Constitution. But until the State acts, we must fulfill our responsibility.

We recognize that any plan drawn by us will not meet with universal favor and may meet with rather general disfavor. But the duty is ours, and we will meet it.

We have, in our orders of November 26 and December 3, established criteria which the parties, intervenors and amicus curiae are requested to follow in preparing plans to apportion the Legislature. The criteria are those which we find best suited to permit compliance with the equal protection standards of the United States Constitution and with State policy to the extent that the latter is consistent with the Constitution.

The only serious questions, that are raised with respect to the criteria, are whether we have the authority to change the size of the Legislature; and if so, to what extent. Our answer is that we must change the size if we are to apportion the State

in accordance with the Federal and State Constitutions, and that we have a right to make those changes which are consistent with the Federal Constitution and State policy.

It is well settled that Federal Three-Judge Courts have jurisdiction to decree existing apportionment plans invalid. *Whitcomb v. Chavis*, 403 U.S. 124 (1971); *Reynolds v. Sims*, 377 U.S. 533, 585 (1964). It is equally clear that they have equitable authority to adopt an apportionment plan if the Legislature fails to do so. *Ely v. Klahr*, 403 U.S. 108 (1971); *Whitcomb v. Chavis, supra; Scott v. Germano*, 381 U.S. 407 (1965). And, finally, it is established that they can change the size of the Legislature, in apportioning the State in accordance with federal constitutional requirements.[1] To put it simply:

> "* * * Once a right and a violation have been shown, the scope of a District Court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies."

---

[1] In the following cases, the federal courts have altered the existing size of a state legislature: *Klahr v. Goddard*, 250 F. Supp. 537 (D. Ariz. 1966) (Senate reduced from 31 to 30, House from 80 to 60); *Herweg v. 39th Legislative Assembly*, 246 F. Supp. 454 (D. Mont. 1965) (Senate reduced from 56 to 55, apparently increased size of House); *Paulson v. Meier*, 246 F. Supp. 36 (D. N.D. 1965) (Senate reduced from 53 to 49, House from 113 to 98); *Schaefer v. Thompson*, 240 F. Supp. 247 (D. Wyo. 1964) (Senate increased from 25 to 30). In other cases, federal courts have altered the size of the existing legislatures by adopting a size established in new apportionment plans which had been voided for violating the Federal or State Constitution. *Swann v. Adams*, 263 F. Supp. 225 (D. Fla. 1967); *WMCA, Inc. v. Lomenzo*, 238 F. Supp. 916 (S.D. N.Y.), *aff'd per curiam*, 384 U.S. 4 (1965). These latter two cases are in accord with our view that if the Minnesota Legislature had passed and the Governor had signed an apportionment plan this past year, principles of federalism would strongly compel us to attempt to follow that current and clear expression of State policy as to the size of the Legislature. Such was not the case.

Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1, 15 (1971). See also, *Hecht Co. v. Bowles*, 321 U.S. 321, 329 (1944).

The Legislature cannot be apportioned into 67 Senate Districts and 135 House Districts without violating either the Federal or State Constitutions.

The practice of the last fifty-four years of dividing one Senatorial District into three House Districts, while all other Senatorial Districts are divided into two House Districts, cannot be continued without violating the equal protection requirements.

The alternative of having one at-large House District would be contrary to the provisions of Article 4, Section 24, of the Minnesota State Constitution, which provides that no representative district shall be divided in the formation of a Senate District. Moreover, this alternative would impose an impossible burden on candidates for the at-large seat.

We thus find that the size of the Legislature must be changed, and we consider federal constitutional requirements and State policy to determine the appropriate size.

(1) The larger the population of each Senate and House District, the more closely can the equal protection (one man-one vote) requirements be met and still give effect to the State policy of adhering to the boundaries of political subdivisions. Conversely, the smaller the population of each district, the greater the likelihood that the deviations will be higher than are acceptable or that artificial boundaries will result.

(2) State policy with respect to the size of the Legislature is difficult to discern. The State Constitution does not fix the size. The size has been changed from time to time in the ap-

portionment process;[2] and when it was last changed in 1966, the size was fixed "until a new apportionment shall have been made." Minnesota Statutes, 1969, 2.021. The 1971 Legislative Apportionment Plan was not approved by the Governor, and thus cannot be taken as a current expression of State policy as to size,[3] particularly as the Governor recommended that the size of the Legislature be reduced in a Special Message to the Legislature[4] and vetoed the Legislative Plan.

(3) There is merit in having an odd-numbered Senate and House, particularly as Minnesota is a state with two strong and rather evenly divided political parties. Furthermore, legislative apportionment plans have, more often than not, provided for an odd-numbered Senate and House.[5]

Considering all factors, we find that federal constitutional and State policy requirements can best be harmonized by

---

[2] The size of the Legislature has been changed ten times since 1857. The changes are as follows:

	Senate	*House*	*Total*
1857	37	80	117
1860	21	42	63
1866	22	47	69
1871	41	106	147
1881	47	103	150
1889	54	114	168
1897	63	119	182
1913	67	130	197
1917	67	131	198
1959	67	135	202
1966	67	135	202

1957-58 Minnesota Legislative Manual 127; Laws 1913, Ch. 91; Laws 1917, Ch. 217; Laws 1959, Ch. 45; Laws 1966 Extra Session, Ch. 1.

[3] Under Minnesota law, a legislative apportionment act is subject to the Governor's veto. *Duxbury v. Donovan*, 272 Minn. 424, 138 N.W. 2d 692 (1965).

[4] See this Court's Memorandum in Support of Order, November 26, 1972, n. 2.

[5] See n. 2, *supra*.

having 35 Senate Districts and by dividing each Senate District into three House Districts. By so doing, we can best meet equality of population standards, prevent overlapping of Senate and House Districts, and retain an odd number of Senate and House Districts.

We recognize that these purposes might also be met by having a Senate of 45 members and a House of 135 members, or a Senate of 33 members and a House of 99 members. But we feel that we can most closely meet all of the requirements by setting the size at the levels we have.

Furthermore, persuasive arguments have been made that positive benefits to the State will accrue by substantially reducing the size of the Senate and moderately reducing the size of the House. Some of these benefits were outlined in our memorandum of November 26, 1971, and need not be repeated here.

Finally, we repeat that it is not our desire to fix for the future the size of the Senate and the House in Minnesota. The Legislature may, if it desires, apportion the State in any manner that it sees fit, consistent with the equal protection clause of the United States Constitution, either before or after the 1972 general elections.

The Court reserves the right to file a more detailed memorandum in support of its order at a later date.

SECOND READING OF SENATE BILL

S. F. No. 80 was read the second time.

MOTIONS AND RESOLUTIONS—Continued

Mr. Holmquist for the Committee on Rules and Administration introduced Senate Resolution No. 3.

A senate resolution relating to reapportionment; authorizing participation in the state and federal courts.

WHEREAS, it is the duty and responsibility of the legislature from time to time to prescribe the bounds of congressional, senatorial and representative districts; and

WHEREAS, the legislature has apportioned anew the senators and representatives among the several districts in the years 1959 and 1966; and

WHEREAS, the most recent enumeration of the inhabitants of this state made by the authority of the United States was not completed prior to the adjournment sine die of the 1971 regular session of the legislature, or the adjournment of the 1971 special session, and is not yet complete; and

WHEREAS, the senate through its committee on elections and reapportionment has been diligently and continuously engaged in the business of studying and evaluating the various forms and numbers of senatorial districts despite the unavailability of complete enumeration information but nonetheless has, together with the house of representatives, prescribed the bounds of congressional districts, which prescription has become chapter 897 of the laws of 1971; and both bodies have passed, during the 1971 special session, H. F. No. 76, a bill for an act relating to the legislature; apportioning legislative districts; repealing Minnesota Statutes 1969, Sections 2.031

to 2.712, which bill is now in conference between the two Houses; and

WHEREAS, certain citizens have invoked the jurisdiction of the United States District Court challenging the propriety and constitutionality of the existing legislative apportionment created by Extra Session Laws 1966, Chapter 1, by serving upon certain elected state and local officials a summons and complaint styled *Richard A. Beens et al, plaintiffs, vs. Arlen Erdahl et al,* defendants, docketed as Civil action No. 4-71, civil 151; and

WHEREAS, said complaint prays that further elections of members of the legislature be enjoined and that the court take certain other affirmative actions all in derogation of the rights and responsibilities of the legislature and its members; and

WHEREAS, it appears that the constitutional rights and interests of the senate might be jeopardized by future actions of the court or the parties in the case at bar unless the senate is adequately represented and afforded an opportunity t obe heard on its own behalf of the citizens of the state; now, therefore,

BE IT RESOLVED, by the Senate of the State of Minnesota, that the Office of Senate Counsel be and it is hereby authorized and directed to take such steps as may be necessary to represent the interests and will of this body to the extent deemed necessary in both state and federal court actions involving the prescription of the bounds of senatorial and representative districts, the apportionment of senators and representatives among those districts, and the orderly process of elections therefrom, and that necessary fees and expenses relative thereto be authorized for payment upon approval by

the Committee on Rules and Legislative Administration, to be paid from the standing committee fund of the Senate.

Mr. Holmquist moved that the foregoing resolution be adopted.

The question being taken on adoption of the resolution.

And the roll being called, there were yeas 56 and nays none, as follows:

Those who voted in the affirmative were:

Anderson, E. J.	Hansen, Mel	Olson, H. D.
Anderson, J. C.	Hanson, N. W.	Olson, J. L.
Anderson, J. T.	Holmquist	O'Neill
Arnold	Holsten	Overgaard
Ashbach	Hughes, J. M.	Palmer
Benson	Jensen, C. A.	Parish
Bergerud	Josefson	Perpich, A. J.
Blatz	Jude	Perpich, G.
Borden	Kalina	Pillsbury
Brown	Kirchner	Purfeerst
Chmielewski	Krieger	Schrom
Conzemius	Larson	Sinclair
Davies	Laufenburger	Tennessen
Doty	Mammenga	Thorup
Frederick	McCarty	Ukkelberg
Gearty	McCutcheon	Wegener
Glewwe	Metcalf	Willet
Gustafson	Moe	Wolfe
Hansen, Baldy	Olson, A. G.	

Which motion prevailed. So the resolution was adopted.

RECONSIDERATION

Mr. Kalina moved that the vote whereby Senate Resolution No. 3 was passed by the Senate on July 31, 1971, be now reconsidered.

The question being taken on the motion of Mr. Kalina.

And the roll being called, there were yeas 31 and nays 33, as follows:

Those who voted in the affirmative were:

Anderson, J. C.	Hansen, Baldy	Parish
Arnold	Hanson, N. W.	Perpich, A. J.
Benson	Hughes, J. M.	Perpich, G.
Borden	Jensen, V. K.	Purfeerst
Chenoweth	Kalina	Schrom
Chmielewski	Laufenburger	Tennessen
Coleman	Mammenga	Thorup
Conzemius	Moe	Wegener
Davies	Novak	Willet
Doty	Olson, A. G.	
Gearty	Olson, H. D.	

Those who voted in the negative were:

Anderson, E. J.	Holsten	Ogdahl
Anderson, J. T.	Hughes, Keith	Olson, J. L.
Ashbach	Jensen, C. A.	O'Neill
Blatz	Josefson	Overgaard
Brown	Kirchner	Palmer
Dosland	Krieger	Pillsbury
Frederick	Larson	Popham
Gage	McCarty	Renneke
Glewwe	McCutcheon	Sinclair
Hansen, Mel	Metcalf	Ukkelberg
Holmquist	Nyquist	Wolfe

Which motion did not prevail.

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION
4-71-CIV. 151

AFFIDAVIT OF JOHN CHENOWETH

State of Minnesota
County of Ramsey—ss.

John Chenoweth first being duly sworn deposes and says:

That he is the duly elected Minnesota State Senator from the 44th District;

That he was absent from the Senate on July 31, 1971 when Senate Resolution 3 was adopted and did not vote in favor of said Resolution;

That he believes that Senate Resolution 3 had not been read previously on the Senate floor and was not fully debated but hastily adopted;

That had he voted on Senate Resolution 3 he would have voted in the negative;

That he has read said resolution and disagrees with it in several material aspects;

That the position taken by Senate Counsel is his brief submitted to the Court does not reflect the views of affiant;

Further affiant sayeth not except that this affidavit is made in opposition to the Motion to Intervene, filed in the name of the Sixty-seventh Minnesota Senate.

JOHN CHENOWETH

Subscribed and sworn to before me this 6th day of October, 1971.—Alan W. Weinblatt, Notary Public, Ramsey County, Minn. My Commission Expires Aug. 6, 1976.

No. 71-1024

AFFIDAVIT

State of Minnesota
County of Hennepin

Edward Gearty being first duly sworn deposes and says that he is the duly elected and acting Minnesota State Senator from the 39th Senate District. That he was present in the Minnesota State Senate on July 31, 1971 when the Senate adopted Senate Resolution No. 3, and your affiant voted in the affirmative;

That in voting in favor of Senate Resolution No. 3 your affiant did not intend to authorize Senate Counsel to take the within appeal to the United States Supreme Court and had such intention been expressed on behalf of Senate Resolution No. 3 your affiant would not have voted in favor thereof.

That your affiant expressly states that the Office of Senate Counsel does not speak for him in the Supreme Court of the United States in the within matter; and

That this affidavit of disavowal is made in support of plaintiff-appellees motion to dismiss the appeal and to request the Court to relieve affiant from the unauthorized acts of Senate Counsel pursuant to Minnesota Statutes §481.09.

Further affiant sayeth not.

EDWARD GEARTY

Subscribed and sworn to before me a notary public this 1st day of March 1972.—J. W. Ronning, Notary Public Hennepin County, Minn. My Commission Expires Feb. 26, 1979.

IN THE
SUPREME COURT OF THE
UNITED STATES
No. 71-1024

AFFIDAVIT

County of St. Louis
State of Minnesota

Earl Gustafson being first duly sworn deposes and says that he is the duly elected and acting Minnesota State Senator from the 60th Senate District. That he was present in the Minnesota State Senate on July 31, 1971 when the Senate adopted Senate Resolution No. 3, and your affiant voted in the affirmative;

That in voting in favor of Senate Resolution No. 3 your affiant did not intend to authorize Senate Counsel to take the within appeal to the United States Supreme Court and had such intention been expressed on behalf of Senate Resolution No. 3 your affiant would not have voted in favor thereof.

That your affiant expressly states that the Office of Senate Counsel does not speak for him in the Supreme Court of the United States in the within matter; and

That this affidavit of disavowal is made in support of plaintiff-appellees motion to dismiss the appeal and to request the Court to relieve affiant from the unauthorized acts of Senate Counsel pursuant to Minnesota §481.09.

Further affiant sayeth not.

EARL GUSTAFSON

Subscribed and sworn to before me a notary public this 1st day of March 1972.—Galen C. Wilson, Notary Public St. Louis County, Minn. My Commission Expires Jan. 22, 1976.

IN THE
SUPREME COURT OF THE
UNITED STATES
No. 71-1024

AFFIDAVIT

County of St. Louis
State of Minnesota

Ralph Doty being first duly sworn deposes and says that he is the duly elected and acting Minnesota State Senator from the 61st Senate District. That he was present in the Minnesota State Senate on July 31, 1971 when the Senate adopted Senate Resolution No. 3, and your affiant voted in the affirmative;

That in voting in favor of Senate Resolution No. 3 your affiant did not intend to authorize Senate Counsel to take the within appeal to the United States Supreme Court and had such intention been expressed on behalf of Senate Resolution No. 3 your affiant would not have voted in favor thereof.

That your affiant expressly states that the Office of Senate Counsel does not speak for him in the Supreme Court of the United States in the within matter; and

That this affidavit of disavowal is made in support of plaintiff-appellees motion to dismiss the appeal and to request the Court to relieve affiant from the unauthorized acts of Senate Counsel pursuant to Minnesota §481.09.

Further affiant sayeth not,

RALPH R. DOTY

Subscribed and sworn to before me a notary public this 3rd day of March 1972.—Adalee Flokstra, Notary Public St. Louis County, Minn. My Commission Expires Feb. 20, 1975.

IN THE
SUPREME COURT OF THE
UNITED STATES
No. 71-1024

AFFIDAVIT

State of Minnesota
County of

A. J. Perpich being first duly sworn deposes and says that he is the duly elected and acting Minnesota State Senator from the 62nd Senate District. That he was present in the Minnesota State Senate on July 31, 1972 when the Senate adopted Senate Resolution No. 3, and your affiant voted in the affirmative;

That in voting in favor of Senate Resolution No. 3 your affiant did not intend to authorize Senate Counsel to take the within appeal to the United States Supreme Court and had such intention been expressed on behalf of Senate Resolution No. 3 your affiant would not have voted in favor thereof.

That your affiant expressly states that the Office of Senate Counsel does not speak for him in the Supreme Court of the United States in the within matter; and

That this affidavit of disavowal is made in support of plaintiff-appellees motion to dismiss the appeal and to request the Court to relieve affiant from the unauthorized acts of Senate Counsel pursuant to Minnesota §481.09.

Further affiant sayeth not.

SENATOR TONY PERPICH

Mar. 7, 1972

Eveleth, Minn.

(Jurat)